IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.63 OF 2006
WITH
CIVIL REVISION APPLICATION NO.64 OF 2006

Shri Uttam Punju Pagar. ..Applicant.

V/s.

Mr.Somnath Bhatu Sonawane & Anr. ..Respondent.

Mr.Balasaheb Apte, Sr.Counsel with Shriram S.Kulkarni for applicant.

Mr.Promod N. Joshi with with P.N.Joshi for respondent No.1.

CORAM: A.M.KHANWILKAR,J

DATE : APRIL 12, 2006.

P.C. :

1. Heard counsel for the parties.

2. I am disposing of both the revision applications by this common order.

3. Two questions are raised for my consideration. First question is, whether the former suit filed by the respondent No.1 simplicitor for injunction can be said to be not maintainable as the respondent No.1 has failed to seek relief of specific performance in the said suit. The second question arises in the later suit filed by the respondent No.1

for relief of specific performance. The question is, whether the later suit is barred on account of provisions of Order 2 Rule 2 of the Code. Indeed, both the questions will have to be answered independently but it will be appropriate to advert to the facts which are common to both the proceedings.

4. It is not in dispute that the suit agreement was executed on 8th October, 1984. Clause 10 and 11 of the said agreement are relevant for our purpose. Clause (10) clearly provides that the Sale Deed will be executed in favour of the respondent No.1 only after his membership is to be accepted by the respondent No.2 Society. Clause 11 provides that for any technical or legal problem, if membership of respondent No.2 society cannot be given to respondent No.1, the agreement will be deemed to have been terminated and in which case the applicant will refund the amount received towards part consideration to the respondent No.1. It is also not in dispute that the membership application was processed and inventory direction was issued to the society by the Registrar to admit the respondent No.1 as its member. Indeed, that direction was challenged by the respondent society which proceedings are said to be pending even till now. Be that as it may, the first

suit filed by the respondent No.1 being R.C.S.No.395 of 1990 is simplicitor for relief of injunction. The cause of action as is noted in the plaint is that the applicant obstructed possession of the respondent No.1. It is common ground that the respondent No.1 was put in possession of the dispute property after execution of the suit agreement and payment of part consideration. On reading the plaint as a whole, the stand taken on behalf of the respondent No.1, which has been accepted by the trial Court will have to be upheld. This is so because, the suit is simplicitor for permanent injunction which is instituted on the cause of action arising out of obstruction created by the applicant to the peaceful enjoyment of the suit property. In that sense it is not a suit founded on the right available to the respondent No.1 under section 53A of the Transfer of Property Act. Viewed thus, the fact that relief of specific performance has not been prayed in the first suit cannot be the basis to hold that the said suit is not maintainable.

5. Once this question is addressed, which in my opinion, is overlapping with the issue to be answered in the application filed in the later suit at the instance of applicant. The question is, whether the later suit will be barred by provisions of Order 2

Rule 2 of the Code. The later suit which has been filed by the respondent No.1 clearly proceeds to record that the cause of action arose for filing of the said suit for the first time on 6/3/1991 when the applicant informed the respondent No.1 by communication that he has cancelled the suit agreement. This assertion is made in paragraph-14 of the plaint in suit No.190 of 1993. The relief which is claimed in this suit was obviously unavailable to the respondent No.1 when the former suit was filed in the year 1990. This is so because, in 1990, the question of applying for relief of specific performance of the suit agreement will not arise in view of clear contention in clause 10 and 11 of the suit agreement. The cause of action to seek that relief in my opinion, as is rightly contended by respondent No.1, would arise only after communication sent by the applicant dated 6th March, 1991. Viewed thus, the question of later suit being barred by provisions of Order 2 Rule 2 is untenable.

6. Counsel for the applicant however, placed reliance on the decision of the Apex Court in the case of **Kunjan Nair Sivaraman Nair V/s. Narayanan Nair & Ors. reported in (2004) 3 Supreme Court Cases 277.** Emphasis was placed on the exposition in

paragraph-10, 15 to 19 of the reported decision. In paragraph-10 of this decision, the principle as to when the provision of Order 2 Rule 2 would apply, have been stated as there must be identical cause of action in both the suits. The salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicted in successive litigations. In the present case, as has been seen earlier the first suit was filed by the respondent No.1, on which date the cause of action to claim relief of specific performance (in the year 1990) was not available to the respondent No.1. That cause of action arose only after receipt of communication dated 6th March, 1991. Reliance was also placed on the decision of the Apex Court in the case of **N.V.Srinivasa Murthy & Ors.** V**/s.Mariyamma(dead) by proposed Lrs. & Ors.** reported in **(2005) 5 Supreme Court Cases 548.** The principle stated in this decision is more or less same as legal position stated in **Kunjan Nair Sivaraman Nair(supra).** Reliance was then placed by the counsel for the applicant on the decision of our High Court in the case of **Hussain Khan s/o Sawarkdhan Pathan V/s. Shaikh Ahmed s/o Shaikh Lal,** reported in **1988 Mh.L.J., 55.** This decision is also of no avail

to the applicant in the present case. The first suit instituted by the respondent No.1 is founded independently on other cause of action and not related to section 53A of the Transfer of Property Act. If this is the fact situation, the question of former suit being not maintainable for having failed to claim relief of specific performance does not arise. In other words, I see no infirmity in the view taken by the court below in the two orders which are impugned in the respective revision applications. There is no fault either in the approach or the ultimate conclusion reached by the court below in rejecting the respective applications. Hence dismissed.

7. At this stage, counsel for the applicant prays that the trial court may be directed not to proceed with the trial for some reasonable time to enable the applicant to proceed in appeal before the Apex court. Request being reasonable, though opposed by the respondent no.1 will have to be granted. The trial court shall not proceed with the trial in the respective suits for a period of four weeks from today.